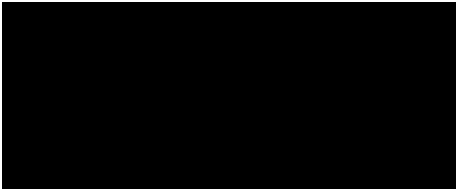




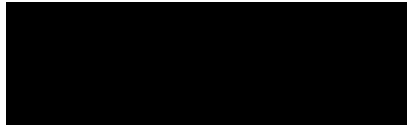
U.S. Citizenship
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Services

B-6



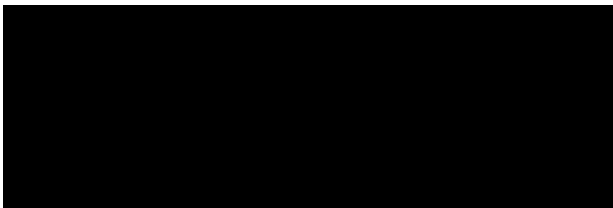
FILE: WAC 02 197 51193 Office: CALIFORNIA SERVICE CENTER Date: ~~Jul~~ 22 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a food product distributor. It seeks to employ the beneficiary permanently in the United States as a market analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 23, 1997. The proffered wage as stated on the Form ETA 750 is \$31,000 per year.

Counsel submitted the petition on May 30, 2002. With the petition, counsel submitted the petitioner's 1997, 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns.

The 1997 return states that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$22,080 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities of \$188,220 exceeded its current assets of \$185,339.

The 1998 return states that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$30,882 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$165,068 and current liabilities of \$102,173, which yields net current assets of \$62,895.

The 1999 return states that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$34,304 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$132,335 and current liabilities of \$5,365, which yields net current assets of \$126,970.

The 2000 return states that the petitioner declared a loss of \$11,979 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$341,705 and current liabilities of \$244,924, which yields net current assets of \$96,781.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on September 13, 2002, requested additional evidence pertinent to that ability. The Service Center specifically requested that, consistent with 8 C.F.R. § 204.5(g)(2), the petitioner send either copies of annual reports, federal tax returns, or audited financial statements for 2001.

In response, counsel submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. Counsel also submitted copies of the petitioner's bank statements for each month during 1997, 1998, 1999, 2000, and 2001, and copies of 2001 Form W-2 Wage and Tax Statements showing wages paid to Lloyd Sinclair and Esperanza Sinclair during that year. Counsel did not state in what way the W-2 forms might be relevant to the petitioner's ability to pay the proffered wage.

The 2001 return shows that during that year the petitioner declared a loss of \$41,289 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$247,805 and current liabilities of \$234,122, which yields net current assets of \$13,683.

In a letter, dated November 13, 2002, counsel argued that the documents provided demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date even though it declared losses on its taxes.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 24, 2003, denied the petition.

On appeal, counsel submits a brief. In addition, counsel submits, (1) an electronically generated letter, dated May 7, 2001, from the IRS, (2) an electronically generated letter to the petitioner, dated July 27, 2001, from the California Franchise Tax Board, (3) two additional monthly bank statements for 2001, and (4) a letter,

dated February 10, 2003, from an accountant. The accountant states that he is the petitioner's authorized payroll accountant and that the petitioner has been meeting its weekly payroll.

The May 7, 2001 letter from the IRS letter states that the petitioner was assessed an additional \$25,973 in taxes for 1997, in addition to penalties and interest. It does not state the petitioner's amended taxable income before net operating loss deduction and special deductions or year-end net current assets for that year, nor provide information from which they may be computed.

The July 27, 2001 letter from the California Franchise Tax Board also assesses additional taxes for 1997. That letter states that the petitioner's net income as reported on its state income tax return was revised from \$22,080 to \$118,038.

Counsel further argues that, because the petitioner pays its employees weekly, the petitioner's bank balances need only be sufficient to cover the beneficiary's weekly or monthly salary in order to demonstrate the petitioner's ability to pay the proffered wage. Counsel observes that each month's bank balance exceeded the monthly portion of the proffered wage, and argues that the petitioner's bank balances demonstrate, therefore, its ability to pay the proffered wage.

In support of the contention that bank balances may thus be used to show the ability to pay the proffered wage, counsel cites a non-precedent decision of this office. Counsel does not submit the text of that decision, nor does he quote any relevant portion. Instead, counsel submits a précis concerning that case from an immigration lawyers' association. The précis states that, "the aspect of the case that was apparently persuasive to the (AAO) was the fact that the company maintained a balance in its checking account for each month sufficient to pay the prevailing wage."

As the text of that decision is not in the record, whether that statement is accurate is unclear. It is also irrelevant. Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. As such, the petitioner's bank balances are insufficient to show the petitioner's ability to pay the proffered wage either on an annual or a monthly basis.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is September 23, 1997. The proffered wage is \$31,000 per year.

The evidence pertinent to 1997 is unclear. With the petition, counsel submitted the petitioner's 1997 return, which states that the petitioner declared taxable income before net operating loss deduction and special deductions of \$22,080 during that year and had negative year-end net current assets. Those figures do not show the ability to pay the proffered wage during 1997. The May 7, 2001 letter from IRS makes clear that it subsequently recomputed and raised the petitioner's taxable income for that year, but does not make clear what the final figure was. The July 27, 2001 letter from the California Franchise Tax Board shows that it recomputed and raised the petitioner's net income from \$22,080 to \$118,038. The petitioner's 1997 taxable income before net operating loss deduction and special deductions was also \$22,080. One might conclude that the petitioner's 1997 taxable income before net operating loss deduction and special deductions was likely raised approximately the same amount as the net income on its state tax return. One might also note that the petitioner submitted its 1997 tax return with the petition, on May 30, 2002, more than a year after the figures on that form had been invalidated.

In any event, the final, settled amount of the petitioner's 1997 taxable income before net operating loss deduction and special deductions and of its year-end net current assets is insufficiently demonstrated in the record. If the decision in this matter hinged on those figures, the case might merit a remand. In this instance, however, that action is unnecessary.

During 1998, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$30,882. That amount is insufficient to pay the proffered wage. The petitioner ended the year, however, with net current assets of \$62,895. That amount exceeds the amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$34,304. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared a loss of \$11,979 as its taxable income before net operating loss deduction and special deductions during that year. The petitioner has not demonstrated that it was able to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year, however, with net current assets of \$96,781. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared a loss of \$41,289 as its taxable income before net operating loss deduction and special deductions. The petitioner has not demonstrated that it was able to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with net current assets of \$5,183. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.